

REMARKS

The present Office Actions addresses claims 1-24, however claims 18-24 are withdrawn from consideration. Remaining claims 1-17 stand rejected. Reconsideration is respectfully requested in view of the following remarks.

Amendments to the Claims

Applicants cancel withdrawn claims 18-24. Applicants reserve the right to pursue these claims in a divisional application.

Claim Rejections

Claims 1-17 are rejected pursuant to 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 7,179,225 of Shluzas et al. Applicants respectfully disagree.

Claims 1-10

Independent claim 1 recites a minimally invasive surgical method that includes forming an incision through tissue located adjacent to a vertebra in a patient's spinal column, identifying a muscle plane, and inserting a substantially planar blunt tip of a tool through the incision while manipulating the blunt tip along the muscle plane extending between the incision and the vertebra to separate the muscle. Shluzas fails to teach or even suggest the claimed method.

At the outset, Shluzas fails to teach a method that includes identifying a muscle plane. The Examiner argues that this is an inherent decision of the surgeon. In order for a reference to inherently anticipate, the claimed limitation must be necessarily present in the disclosure. Shluzas method does not necessarily require that the muscle plane be identified. Shluzas merely states that an incision is made in the skin, and a guide wire is introduced through the skin, fascia, and muscle to the surgical site, then a series of dilators are used to sequentially expand the incision followed by placement of an access device for providing a pathway to the surgical site. (See Col. 22, lines 22-43.) Such a disclosure by Shluzas does not necessarily require the muscle plane to be identified. To the contrary, the disclosure indicated that the guide wire is inserted directly through the muscle without regard to a location of muscle plane. The present invention provides a novel method that avoids damage to the muscles by identifying the

muscle plane, and using a tool to separate the muscles along the plane to provide access to the surgical site. Shluzas does not teach or even suggest such a method.

Shluzas also fails to teach or even suggest inserting a substantially planar blunt tip of a tool through the incision while manipulating the blunt tip along the muscle plane extending between the incision and the vertebra to separate the muscle. The Examiner argues that the retractor of Shluzas meets the claim limitations because it aids in providing access separating the muscles. The various retractors disclosed by Shluzas, however, do not have a planar blunt tip. To the contrary, each retractor has a cylindrical configuration with a hollow cylindrical tip. The retractors are also not used to separate the muscles, but rather are merely used to expand the pathway. Again, Shluzas does not teach or even suggest any method in which muscles are separated along a muscle plane, much less one in which a planar blunt tip tool is used.

Shluzas is therefore deficient for several reasons, and thus cannot anticipate claim 1. Accordingly, claim 1, as well as claims 2-10 which depend therefrom, distinguish over Shluzas and represent allowable subject matter.

Claims 11-17

Independent claim 11 recites a minimally invasive surgical method that includes making a first incision in a patient, inserting a blunt tip of a tool through the first incision and manipulating the blunt tip to create a first pathway from the first incision, between a muscle plane, to a first site on a first vertebral body, and advancing a guide wire through the tool to position a distal end of the guide wire adjacent the first site.

As discussed above with respect to claim 1, Shluzas fails to teach or even suggest a method in which a tool is inserted between a muscle plane. To the contrary, Shluzas indicates that the guide wire is merely penetrated through the muscle. As further discussed above, Shluzas also fails to teach a method in which a blunt tip tool is used. Shluzas further fails to teach advancing a guide wire through a tool to position a distal end of the guide wire adjacent a first site, as further required by claim 11. To the contrary, Shluzas' method requires that a guide wire be inserted first, and then several dilators be inserted over the guide wire to dilate the tissue. Shluzas' guide wire is never inserted through a tool.

Shluzas is therefore deficient for several reasons, and thus cannot anticipate claim 11. Accordingly, claim 11, as well as claims 12-17 which depend therefrom, distinguish over Shluzas and represent allowable subject matter.

Conclusion

In view of the above, Applicant believes that all claims are in condition for allowance and allowance thereof is respectfully requested.

Dated: July 25, 2007

Respectfully submitted,

By: /Lisa Adams/
Lisa Adams
Registration No.: 44,238
NUTTER MCCLENNEN & FISH LLP
World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210-2604
(617) 439-2550
(617) 310-9550 (Fax)
Attorney for Applicant